No. 86-1778

IN THE

Supreme Court of the United States

October Term, 1986

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

THE NASSAU COUNTY REPUBLICAN COMMITTEE and THE TOWN OF HEMPSTEAD REPUBLICAN COMMITTEE,

Defendants-Petitioners,

against

LORRAINE C. CULLEN; JOHN L. JUND; and MICHAEL LANDI, on behalf of each, and on behalf of all persons similarly situated; namely, those employees of the County of Nassau; the Towns of Hempstead, and Oyster Bay; and the Village of Hempstead, who have been subjected to solicitations for campaign contributions to the Republican Party in an inherently coercive manner or who have been subjected to scrutiny by officials of the Republican Party in connection with their hiring, employment or promotion; and CIVIL SERVICE MERIT COUNCIL OF LONG ISLAND,

Plaintiffs-Respondents,

and

THE TOWN OF HEMPSTEAD and THE COUNTY OF NASSAU,

Defendants-Respondents,

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Reply Brief of Petitioners on Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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and

JOSEPH P. MARGIOTTA, JR., individually and in his capacity as Chairman of the Nassau County Republican Committee and the Chairman of the Town of Hempstead Republican Committee, FRANCIS T. PURCELL, individually and in his capacity as County Executive of the County of Nassau and past Presiding Supervisor of the Town of Hempstead; THE NASSAU COUNTY REPUBLICAN COMMITTEE; THE TOWN OF HEMPSTEAD REPUBLICAN COMMITTEE: THE VILLAGE OF HEMPSTEAD REPUBLICAN COMMITTEE, STANLEY DRAUSE, individually and as Finance Chairman of the Nassau County Republican Committee; ANDREW J. PARISI, HOWARD LEVITT and EASA EASA, individually and as Finance Chairman of the Town of Hempstead Republican Committee; RALPH CASO, individually and in his capacity as Past County Executive of the County of Nassau and past presiding Supervisor of the Town of Hempstead; DONALD WOOLNOUGH, individually, in his capacity as an employee of the Nassau County Republican Committee, and as an agent of Joseph P. Margiotta, Jr.; ARLENE MATHEWSON, individually, in her capacity as an employee of the Nassau County Republican Committee, and as an agent of Donald Woolnough and Joseph P. Margiotta, Jr.; ISABEL DODD, individually, in her capacity as an employee of the Nassau County Republican Committee, and as an agent of Joseph P. Margiotta, Jr., ROBERT D. LIVINGSTON, JR., individually and in his capacity as a member of the Town of Hempstead Republican Committee and the Executive Leader of the Village of Hempstead Republican Party: MURIEL DELAC, individually and in her capacity as Director of Personnel of the Town of Hempstead; HAROLD BRAUN, individually and in his capacity as Director of Personnel of the Town of Hempstead; SIDNEY ROSENTHAL, individually and in his capacity as Chairman of the Hempstead Civil Service Commission; ADELE LEONARD, individually and in her capacity as Chairman of the Nassau County Civil Service Commission; WILLIAM LANDMAN, individually and for actions taken under color of his office as Commissioner of Sanitation of the Town of Hempstead; HAROLD HAFF, individually and for actions taken under color of his office as Highway Commissioner of the Town of Hempstead; WILLIAM PHEARS, individually and for actions taken under color of his office as Water Commissioner of the Town of Hempstead, HAROLD UDELL, individually and for actions taken under color of his office as Commissioner of Conservation and Waterways of the Town of Hempstead; RAYMOND GRABER, individually and for actions taken under color of his office as Deputy Commissioner of Conservation and Waterways of the Town of Hempstead; GARDINER S. McMULLEN. individually and for actions taken under color of his office as Commissioner of Parks and Recreation of the Town of Hempstead; JOHN HANSEN, individually and for actions taken under color of his office as Deputy Commissioner of Parks and Recreation of the Town of Hempstead; AUGUST COSENZA, individually and for actions taken under color of his office as an Assistant Sanitation Supervisor of the Town of Hempstead; THE TOWN OF HEMPSTEAD; THE COUNTY OF NASSAU; and JOHN DOE, representing certain other, as yet, unknown agents of the County of Nassau, the Town of Hempstead, the Nassau County Republican Committee, the Town of Hempstead Republican Committee, and the Village of Hempstead Republican Committee,

Defendants.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986.

No. 86-1178

THE NASSAU COUNTY REPUBLICAN COMMITTEE and THE TOWN OF HEMPSTEAD REPUBLICAN COMMITTEE,

Defendants-Petitioners,

against

LORRAINE C. CULLEN; JOHN L. JUND; and MICHAEL LANDI, on behalf of each, and on behalf of all persons similarly situated; namely, those employees of the County of Nassau; the Towns of Hempstead, and Oyster Bay; and the Village of Hempstead, who have been subjected to solicitations for campaign contributions to the Republican Party in an inherently coercive manner or who have been subjected to scrutiny by officials of the Republican Party in connection with their hiring, employment or promotion; and CIVIL SERVICE MERIT COUNCIL OF LONG ISLAND,

Plaintiffs-Respondents,

and

THE TOWN OF HEMPSTEAD and THE COUNTY OF NASSAU,

Defendants-Respondents.

Reply Brief of Petitioners on Writ of Certiorari.

Preliminary Statement.

This Reply Brief is submitted by Petitioners, The Nassau County Republican Committee and The Town of Hempstead Republican Committee, in further support of their request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit. Pursuant to Rule 22.5 of this Court's Rules, Petitioners will address only the arguments first raised in Respondents' "Brief in Opposition."

Respondents have gone to great lengths to avoid discussing the important constitutional questions presented in this case. After seriously mischaracterizing the nature of the First Amendment rights being asserted, Respondents devote their Brief, almost exclusively, to convincing this Court that the petition is "premature." Without citation to a single authority, Respondents bluntly assert that "sound judicial administration and conservation of scarce judicial resources" should be the bases for denying the petition. *Brief in Opposition,* pp. 15-16.

Respondents do not, and indeed, cannot challenge Petitioners' core First Amendment rights to solicit political contributions and to associate freely. Rather, Respondents contend that these rights should continue to be jeopardized, and, perhaps, irretrievably lost while Petitioners litigate the damage claims of individual class members.

Embarking on meaningless tangents[1] and employing such inflammatory rhetoric as "political machine" and

[1]For example, Respondents refer to a collateral criminal proceeding involving Petitioners' former Chairman. *Brief in Opposition,* p. 6, citing *United States v. Margiotta,* 688 F.2d 108 (2d Cir. 1982), *cert. denied,* 461 U.S. 913 (1983). That prosecution has nothing to do with the present case and, in fact, specifically was excluded as evidence at trial (Appendix to Petition, 33b-34b).

"systematic extortion," Respondents seek to deflect this Court's attention from an issue of great importance to the political process and the free exercise of the First Amendment, to wit: Whether an unincorporated political association, engaged in the solicitation of campaign contributions, can be held liable under the Racketeer Influenced Corrupt Organizations Act ("RICO"). As discussed below, this constitutional issue is ripe for review.

The judgment rendered by the Second Circuit has converted RICO into a dangerous weapon that threatens all political associations. This Court certainly has the discretionary authority to review this unprecedented intrusion into the very core of the First Amendment. It is respectfully submitted that the rights being asserted should not be forfeited for the sake of "judicial economy."

I. The Issues Presented by the Petition Are Ripe for Review.

Contrary to Respondents' contention, the issues in this case are particularly ripe for review. The action has been pending for over a decade and the liability trial consumed in excess of six weeks of testimony. Thus, there is an extensive record, replete with concrete facts, upon which to review the constitutional issues presented.[2]

The First Amendment rights being asserted by Petitioners clearly favor a grant of certiorari. In this regard, this Court has been vigilant in protecting even a threatened

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[2]In arguing that the case is premature, Respondents place great reliance on the Second Circuit's remand to the District Court for "factual findings" with respect to RICO. However, for all practical purposes, the Second Circuit has already dictated these findings to the District Court and has, in effect, directed the entry of a finding of liability under RICO against Petitioners. *See* Appendix to Petition, p. 65b.

invasion of First Amendment rights in the political arena without resorting to such concepts as "finality" or fine distinctions regarding "interlocutory appeals." *E.g. Buckley v. Valeo,* 424 U.S. 1, 114-118 (1976). Petitioners contend that the dual rights to solicit campaign contributions and to associate politically have been and will continue to be infringed by the imposition of liability under RICO. Indeed, this Court has acknowledged the stigmatizing effect of RICO allegations even in situations where no constitutional rights are being exercised. *See Sedima S.P.R.L. v. Irmex Company, Inc.,* 105 S.Ct. 3275 (1985).

Respondents resort to a number of false arguments in an effort to mischaracterize the nature of the constitutional rights at stake. Respondents repeatedly harp on the fact that they have elected not to pursue any individuals who actually engaged in the coercive solicitation practices. According to Respondents, the damages they seek will be paid out of Petitioners' "collective assets" and not out of the pockets of any current members. *Brief in Opposition,* p. 4, 20. What Respondents ignore is that the imposition of RICO liability upon Petitioners, without more, necessarily interferes with the constitutional freedoms of their members. *Democratic Party v. Wisconsin,* 450 U.S. 107, 122 (1981).

The record is devoid of any evidence linking any coerced contribution to any funds or assets presently in the custody of Petitioners. Thus, the so-called "refunds" sought by Respondents, now in the form of treble damages under RICO, will be paid out of general party funds donated by individuals to finance current campaigns. Thus, it is specious to argue, as Respondents do, that recovery from Petitioners' "collective assets" somehow

obviates the unconstitutionality of applying the statute to an unincorporated political association.[3]

Respondents also suggest that the case is somehow inappropriate for review because, notwithstanding liability under RICO, Petitioners will still be required to litigate Respondents' claims under 42 U.S.C. §1983. As a practical matter, the Second Circuit dismissed, on jurisdictional grounds, Respondents' appeal which sought dismissal of the civil rights claims. In any event, regardless of the ultimate resolution of Respondents' claims under 42 U.S.C. §1983,[4] Petitioners seek review of and relief from the significant constitutional intrusion resulting from RICO's imposition of quasi-criminal liability and "racketeering" stigmas.

Under Respondents' view, this case will only be "mature" after all the individual class members have tried their damage claims and final judgments have been awarded against Petitioners. By that time, the destructive, unconstitutional effects of RICO liability will have been

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[3]Equally, without merit is Respondents' argument that Petitioners seek "immunity" from liability. The individuals who actually engaged in the wrongful conduct can and should be pursued under RICO. Respondents, however, elected to voluntarily discontinue their claims against all individual defendants and now assert that it is Petitioners' obligation to "seek contribution from those individuals who played principal roles in the extortionate scheme." *Brief in Opposition*, p. 20.

[4]Petitioners consistently have been frustrated in their efforts to obtain review of Respondents' claims under 18 U.S.C. §1983. The Second Circuit has dismissed their appeals on two occasions, based solely on a lack of finality. Appendix to Petition at 15b; *Cullen v. Margiotta*, 618 F.2d 22 (2d Cir. 1980). Respondents premise liability under 42 U.S.C. §1983 on a violation of their right to free political association. Yet, every witness that testified at trial, even those called by Respondents, were registered and, in most cases, active members of the Republican Party. Thus, Respondents' claims that they were compelled to associate politically are of dubious constitutional validity.

wrought on Petitioners and their First Amendment rights destroyed. Review by this Court is not only appropriate, but essential to the continued vitality of the political process throughout the country.

II. Rule 17(b) of The Federal Rules of Civil Procedure Does Not Render Petitioners Liable as "Persons" Under RICO.

Without reference to a single case brought under 18 U.S.C. §1964, Respondents argue that Petitioners are "persons" suable under RICO pursuant to Rule 17(b) of The Federal Rules of Civil Procedure. *Brief in Opposition,* pp. 21-29.[5] Such reliance clearly is misplaced.

Rule 17 of The Federal Rules of Civil Procedure merely defines the capacity of an unincorporated association to be sued and does not, in any sense, address what must be established, as a matter of substantive law, to impose RICO liability on Petitioners. *See* 3 J. Moore and J. Lucas, *Moore's Federal Practice,* para. 17.25, n. 29 (1985) (and cases cited therein). In the very case quoted by Respondents in the Brief in Opposition, Judge Learned Hand expressly acknowledged that, as to unincorporated associations, the enactment of Rule 17(b) did not change "the nature of the liability, which at common law in cases of tort was that of the members severally. Indeed, that was almost inevitable unless a new jural person were created upon which to impose a collective liability." *Sperry Products v. Association of American Railroads,* 132 F2d 408,

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[5]Respondents contend, without any reference to the record, that Petitioners are entities "capable of holding a legal or beneficial interest in property." *Brief in Opposition,* p. 22. As discussed in the Petition, however, the law is directly contrary. As unincorporated associations, Petitioners have no existence independent of their membership and, thus, are unable to possess property. *See* cases cited in *Petition for Certiorari,* pp. 15-18.

410 (2d Cir. 1942); *accord United States v. White,* 322 U.S. 694, 702 (1944).

In short, Rule 17(b) does not make Petitioners "persons" for purposes of RICO. More importantly, this procedural rule simply is not determinative of or even relevant to the issue whether application of RICO to Petitioners is violative of the First Amendment.

Conclusion.

For the reasons stated, the petition should be granted.

Respectfully submitted,

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